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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1276

GERARDO A. RE, aslo known as JERRY A. RE, and GERARD F. RE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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Petitioners Gerardo A. Re, also known as Jerry A. Re, and Gerard F. Re, pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on February 6, 1967.

Opinion Below

The opinion of the Court of Appeals in this case has not yet been reported. This opinion is set forth as Appendix "A" hereto, *infra*.

Jurisdiction

The order of the Court of Appeals was entered on February 6, 1967. A timely petition for rehearing and for

rehearing *en banc* was filed on February 20, 1967. Said petition was denied on March 16, 1967. (See Appendices "B" and "C", *infra.*) The jurisdiction of this Court is invoked under Title 28, United States Code, § 1254(1).

Questions Presented

The following questions are presented in this proceeding:

1. Whether the failure to grant petitioners an evidentiary hearing on their post-convicition petitions was in direct and prejudicial violation of the clear provisions of Title 28, United States Code, § 2255, and this Court's decisions in *United States* v. *Hayman,* 342 U. S. 205 (1952) and *Machibroda* v. *United States,* 368 U. S. 487 (1962):

2. Whether the holding of an *in camera* hearing during the course of petitioners' trial, from which they were specifically excluded in violation of their constitutional rights of witness confrontation and a public trial, and at which they were denied the right to be witnesses and to present evidence in their own behalf, requires a reversal of the judgments of conviction against them.

3. Whether the order suppressing evidence obtained in violation of the Fourth Amendment to the Constitution, entered in this case on behalf of co-defendant Birrell, inures to petitioners' benefit, requiring reversal of the judgments of conviction entered agaist them.

Constitutional Provisions, Statutes and Rules Involved

CONSTITUTION OF THE UNITED STATES

Amendment IV Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . to be confronted with the witnesses against him . . .

TITLE 18, UNITED STATES CODE

§ 3481 Competency of accused

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

§ 455 Interest of justice or judge

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

§ 1651 Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

§ 2255 Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. * * *

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 41.

(e) Motion for return of property and to suppress evidence.

A person aggrieved by an unlawful search and seizure may move the district court for the district

in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was now aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

Statement of the Case

Prior Proceedings

On April 2, 1962, petitioners Gerardo A. Re, also known as Jerry A. Re, and Gerard F. Re, were indicted along with five co-defendants, including one Lowell M. Birrell, on charges of conspiracy and substantive counts arising out of the alleged sale of unregistered securities, and the making of alleged false statements to the Securities & Exchange Commission. The case was called for trial on May 6, 1963, at which time the government moved to sever the trial of co-defendant Birrell, who was then residing in Brazil. Over the objections of petitioners and their co-defendants, then about to go to trial, this motion was granted. At the same time the trial of the false statements

counts (counts 4, 5, 6, 7 and 8) were severed and these counts have never been tried.

At the trial, petitioners were convicted and sentenced to serve six months' imprisonment and fined $15,000 each. They were also placed on probation for three years each. They appealed to the Court of Appeals for the Second Circuit, and on July 24, 1964, the judgments of conviction were affirmed (336 F. 2d 306). Certiorari was denied by this Court on November 9, 1964 (379 U. S. 904). During all of the prior proceedings in this case petitioners were represented by the same counsel. After petitioners completed their prison sentences and paid their fines, they entered upon the service of their three-year probationary periods, which are still in force.

During November 1964, co-defendant Birrell, who had in the meantime returned to the United States, filed a pretrial motion pursuant to Rule 41(e), Federal Rules of Criminal Procedure, to suppress the bulk of the evidence used at the trial, which had been seized from him in Bucks County, Pennsylvania. This motion was heard by District Judge Inzer B. Wyatt, of the Southern District of New York, and on June 11, 1965, Judge Wyatt filed an opinion suppressing the use as evidence of all of these records. This opinion is reported at 242 F. Supp. 191. The government has conceded that this evidence was necessary and material to petitioners' prosecution and does not claim that its use constituted harmless error (Appellants' Appendix, p. 27a, submitted with this petition).

During the course of the trial it came to petitioners' attention that their former attorney, Milton S. Gould, Esq., had furnished from his files to the government an exhibit of material nature, and that said exhibit was furnished by Mr. Gould ostensibly on behalf of his client, one Nahum Birnbaum, a witness called by the government against petitioners. When petitioners learned of this fact they so advised their trial counsel, who thereupon reported

to the trial judge this apparent violation by this lawyer of the canons of ethics and the rules relating to the conflict of interests by an attorney. Counsel for petitioner Gerardo A. Re asked the trial judge for an evidentiary hearing on the matter.

Thereupon an evidentiary hearing was held *in camera*, in the private chambers of the trial judge, with petitioners specifically excluded therefrom. At this secret hearing the transcript of the testimony was ordered sealed by the trial judge. Witnesses were called to testify, all of whom gave testimony in the absence of all defendants then on trial. Mr. Gould testified concerning his attorney-client relationship with petitioners, but they were not permitted to be present at this examination. Parenthetically, it should be noted that persons other than the defendants on trial were permitted by the trial judge to be present at all sessions of this evidentiary hearing, and that these persons included government witnesses and investigators, as well as the attorneys for various defendants.

Petitioners were never advised, either by their own lawyers or the court, of their absolute constitutional right to be present at this evidentiary proceeding, to their right of confrontation of the witnesses called at the hearing, including their former attorney Gould, and of their right to contradict Gould's testimony by their own testimony and by other evidence in their possession which would refute his testimony.

Until this present proceeding was under way in the district court, petitioners did not learn what had actually taken place at the secret hearing, for the complete transcript of those proceedings had been kept secret from them. A portion of the sealed transcript had been reprinted in their appendix on their direct appeal from the judgment of conviction (with the names of Mr. Gould and his law firm deleted to protect the guilty); but until this proceeding was started, they did not know that the re-

printed portions of the sealed transcript included most or all of Gould's testimony.

As for the implications of Mr. Gould's testimony, these were never fully explained to or made clear to petitioners until this proceeding was already filed in the district court.[1] Although petitioners' prior counsel made much of Mr. Gould's duplicity in the original appeal filed on behalf of petitioners (See 336 F. 2d 306, 318-319), nevertheless these arguments were made on a record which did not contain any evidence supplied by petitioners; and instead, contained testimony by Gould and others given in petitioners' absence from the hearing. Thus, because of petitioners' absence from the hearing there was no confrontation of witnesses as to any of this testimony. Consequently, the record before the Court of Appeals from the original judgment of conviction was based solely on testimony given in isolation from petitioners' scrutiny and personal knowledge, which was not contradicted in any way. No wonder the Court of Appeals was able to make the following finding with respect to this matter in its opinion:

> "We conclude that the conduct of Mr. Z (Gould's masked identity) was not improper and *that appellants have failed to show* that his professional relationship with Birnbaum prejudiced their defense in any manner. Their claim on this point falls well short of the mark that would justify reversing the convictions." (336 F. 2d 306, 319) (Emphasis supplied.)

It was not any error in trial tactics which led to petitioners' absence from the secret hearing, but rather a deliberate and calculated plan by their trial counsel and the trial judge, with the acquiescence of the government attorneys,

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[1] The allegations of this attorney's duplicity and clear violation of the canons of ethics and conflict of interest were set forth in the Supplemental Petition, dated March 22, 1966 (App. App. 8a, 15a-16a).

to protect the former lawyer Gould, which led to their exclusion from this hearing. Nowhere in the record of the original trial is there any statement or other indication that petitioners' absence from said hearing was voluntary and intentional on their part; or that they knowingly absented themselves therefrom. Nor is there any statement in the record that petitioners knowingly waived their rights to be witnesses at said hearing. On these crucial points the record is strangely silent.

The Present Proceeding.

The present proceeding was instituted by the filing of a verified petition by petitioners seeking a writ in the nature of a writ of error *coram nobis,* under the provisions of Title 28, United States Code, § 1651. This petition was filed on March 14, 1966 (App. App. 8a, 9a-14a). Said original petition was based on the principal contention that the district court had ordered the evidence illegally seized from co-defendant Birrell to be suppressed as evidence in the same indictment; and that petitioners' convictions were principally based upon the receipt in evidence of said documentary proof against them. After this petition was filed, petitioners' present counsel learned of the secret *in camera* hearing described hereinabove. Upon learning these facts, and his further investigation, petitioners filed a supplemental petition on March 22, 1966 (App. App. 8a, 15a-16a).

At a preliminary hearing on these petitions before the district court on March 29, 1966, the district judge directed that petitioners file a statement of particulars with respect to their contentions. This statement was filed under date of April 20, 1966, and petitioners therein requested that District Judge Dudley B. Bonsal be disqualified from further participation in said proceedings under the provisions of Title 28, United States Code, § 455, for the reason that said judge would be a necessary and material witness at the evidentiary hearing to be held on the petition and supplemental petition. Petitioners stated that they

intended to call Judge Bonsal as a witness, in order to explore all the facts and circumstances relating to the conduct of the *in camera* hearing. In addition, said statement of particulars elaborated on petitioners' claim that their constitutional rights to confrontation of witnesses, to a public trial, to appear and give testimony at said hearing, were willfully denied to them. Petitioners also stated that they had not waived their rights and that their counsel could not have waived their rights with respect to the conduct of said hearing, and also with respect to the use of the Birrell records which in the meantime had been adjudicated to have been illegally seized. The government submitted an answering affidavit (App. App. 23a-30a), to which petitioners' counsel replied, wherein it was further requested that a hearing on the entire matter be held before some other judge of the district court, so that petitioners' allegations with respect to their petitions could be adjudicated.

Instead of calling for an evidentiary hearing on this matter, District Judge Bonsal himself denied the motion, stating that there was no issue of fact for trial or other hearing. In so doing Judge Bonsal himself made findings of fact based upon his own conduct in the matter; however, he did not permit or give petitioners any opportunity to prove the allegations of their petitions in this proceeding. The opinion of Judge Bonsal is reprinted at App. App. 37a-43a Judge Bonsal in particular stated that because the record is complete and available "there is no basis for a hearing, nor any need for this judge to testify." (App. App. 43a) Yet nowhere in the records of the trial is there one iota of evidence or other proof setting forth the facts from which this conclusion was reached that the entire matter may be ascertained from the records.

The Record

The record in this case before the Court of Appeals consisted of the entire trial record of the district court, consisting of the original trial transcript and appellate proceed-

ings. The additional paper consisted of the petitions filed herein and the other papers filed with the district court, including the opinion of the district judge. These papers were reprinted as Appellants' Appendix in the Court of Appeals, nine printed copies of which have been filed with this court.

Reasons for Granting the Writ

The reasons for granting the writ in this case relate to the protection of the constitutional rights of petitioners and to the proper administration of federal criminal justice.

1. The failure to grant petitioners an evidentiary hearing on their post-conviction petitions was in direct and prejudicial violation of the clear provisions of Title 28, United States Code, § 2255, and this Court's decisions in *United States* v. *Hayman*, 342 U. S. 205 (1952) and *Machibroda* v. *United States*, 368 U. S. 487 (1962). Although the petitions herein were filed under the All Writs Act (28 U.S.C. § 1651), all parties agree that it was appropriate to consider these petitions under 28 U.S.C. § 2255, since petitioners are still serving the probationary period imposed as part of their sentence in the district court. There is no distinction between these two statutes insofar as the relief available to petitioners is concerned. Thus petitioners' allegations that they were expressly excluded from the *in camera* hearing without their consent, and were thus denied the right of confrontation, the right to a public trial on these matters, and the right to present evidence on their own behalf at said hearing, all in contravention of their constitutional rights, required that a hearing be held before the district court on these allegations. This Court so held in less appealing circumstances in the cases of *United States* v. *Hayman, supra*, and *Machibroda* v. *United States, supra*.

Since Judge Bonsal in the district court set forth his version of the facts of what transpired with respect to

petitioners' absence from the *in camera* hearing, petitioners were entitled to test that version of a meaningful hearing. Cases decided by the Second Circuit so provide; see e.g., *United States* v. *Halley,* 240 F. 2d 418 (1957). In the *Hayman* case, *supra,* this Court held that the district court erred in determining factual issues raised by a motion under § 2255 without notice to respondent and without his presence:

> "We hold that the required hearing can be afforded respondent under the procedure established in Section 2255." (342 U. S. 205, 223)

Thereafter in the *Machibroda* case, *supra,* this Court reiterated its holding in *Hayman,* stating:

> "This was not a case where the issues raised by the motion were conclusively determined either by the motion itself or by the 'files and records' in the trial court. The factual allegations contained in the petitioner's motion and affidavit, and put in issue by the affidavit filed with the Government's response, related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light. Nor were the circumstances alleged of a kind that the District Judge could completely resolve by drawing upon his own personal knowledge or recollection." (368 U. S. 487, 494-495)

In affirming the denial of an evidentiary hearing to petitioners in this proceeding, Circuit Judge Hays of the Court of Appeals wrote:

> "Appellants' absence from the hearing was *apparently entirely voluntary* and they would have been admitted had they presented themselves." (Emphasis supplied.)

Thus, too, the Court of Appeals made findings of fact without any record based on an evidentiary hearing before it.

Petitioners' precise complaint in this case is that they *were* specifically excluded from the *in camera* hearing and had no knowledge of the testimony given thereat until long afterwards. Petitioners contended below and repeat in this Court, that had they been permitted to be present at said hearing they would have established a violation by their former attorney Gould of the canons of ethics and the rules against conflict of interests between themselves and his other client Birnbaum, one of the principal witnesses against them at the trial. They would have thereupon presented substantial evidence, both documentary proof and by verbal testimony, to the effect that their former attorney Gould did in fact act in a manner which substantially prejudiced their defense at the trial herein. They would also have shown at this hearing that their then trial counsel kept them from attending the *in camera* hearing, stating that they should not be inside the hearing room, thereby preventing them from learning what was occurring thereat. He failed to tell them that they had an absolute constitutional right to be present at this hearing, and consequently he acted in complete derogation of their constitutional rights. In fact petitioners remained outside the door of the hearing room during the course of the various sessions of the hearing, waiting to be called inside if their counsel saw fit. This fact was clearly establishable by competent proof. Petitioners also would have shown that the trial judge completely ignored their constituitional rights to confrontation of witnesses and to be present at all stages of a trial at which evidence is taken, so as to enable them to meet the issues raised thereat. Petitioners state that the entire affair was conducted in a manner reminiscent of Star Chamber Proceedings of the English Courts of the Reign of King Henry VIII and his successors.

This Court has held that an accused is entitled to be confronted by the witnesses against him, and the failure of said confrontation constitutes a clear violation of the Sixth Amendment, *Pointer* v. *Texas*, 380 U. S. 400, 404-

407 (1965); *Brookhart* v. *Janis*, 384 U. S. 1 (1966). In the *Brookhart* case, this Court reversed a conviction where the accused was present in open court while his lawyer purported to waive his constitutional rights to confrontation of witnesses. This Court, relying upon the leading case of *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938), held that there is a presumption against the waiver of constitutional rights, and for a waiver to be effective, it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege. In this proceeding petitioners were denied the right to make out their case at a meaningful hearing before the district court. Instead all controverted issues of fact were resolved against them without any hearing at all on the matter. For these reasons at least, certiorari should be granted and this case heard by this Court on its merits.

2. The holding of an *in camera* hearing during the course of petitioners' trial, from which they were specifically excluded in violation of their constitutional rights of witness confrontation and a public trial, and at which they were denied the right to be witnesses and to present evidence in their own behalf, requires a reversal of the judgments of conviction against them. The Sixth Amendment to the Constitution provides for speedy and public trials for an accused, as well as the confrontation of the accused by the witnesses against him. Such public trial is an absolute right explicity guaranteed by said amendment, *Levine* v. *United States*, 362 U. S. 610, 616 (1960).

In the failure to afford a defendant a public trial, no prejudice need be shown to warrant the vacation of a judgment of conviction, *United States* v. *Kobli*, 172 F. 2d 919 (3rd Cir., 1949); *Tanksley* v. *United States*, 145 F. 2d 58 (9th Cir., 1944). Cf., *In re Oliver*, 333 U. S. 257, 268-270 (1948). As has been discussed hereinabove, the failure to confront an accused with the witnesses against him also constitutes a clear violation of the Sixth Amendment,

Pointer v. *Texas, supra; Brookhart* v. *Janis, supra.* There was no reason in fact or law for holding the hearing relating to Mr. Gould's duplicity at a secret hearing in the private chambers of the trial judge. All of the circumstances surrounding the conduct of said hearing should be explored, rather than masked by the secrecy of concealed names, and by a refusal to permit petitioners to expose these improprieties to the clear light of judicial scrutiny. To the same extent, the failure to allow petitioners an opportunity to testify at said hearing was also in violation of their rights, 18 U.S.C. § 3481; *Poe* v. *United States,* 233 F. Supp. 173 (D.C.D.C., 1964, opinion by Circuit Judge Wright).

This case does not involve the situation of a chambers or side-bar conference among court and counsel held with the defendants absent and without their objection; rather the situation was that of holding an evidentiary hearing on an integral part of the case in the privacy of the judge's personal chambers, at which witnesses were sworn and testimony taken, with the record ordered sealed, the public excluded and the defendants themselves involuntarily excluded from attendance at the various sessions of the hearing. In less appealing circumstances, the New York Court of Appeals recently held that conducting a pre-trial hearing to suppress evidence with the defendant absent constitutes a violation of his rights to be confronted by the witnesses against him, thereby requiring reversal of the conviction. *People* v. *Anderson,* 16 N. Y. 2d 282 (1965).

This Court recently held that a failure to allow an accused an opportunity to participate in a meaningful hearing violates the Due Process clause of the Fifth Amendment. See e.g., *Specht* v. *Patterson,* 35 U.S.L.W. 4340 (decided, April 11, 1967); and *Spevack* v. *Klein,* 35 U.S.L.W. 4140, 4142 (decided, January 16, 1967).

For the fundamental violation of petitioners' constitutional rights in these proceedings, the judgments of con-

viction originally entered against them should be reversed and a new trial ordered. This matter warrants review by this Court, and for this reason also, certiorari should be granted.

3. The order suppressing evidence obtained in violation of the Fourth Amendment to the Constitution, entered in this case on behalf of co-defendant Birrell, inures to petitioners' benefit, requiring reversal of the judgments of conviction entered against them. The government has conceded in this proceeding that the use of the so-called Birrell records was material and necessary to petitioners' convictions, and that their use did not constitute harmless error. The Court of Appeals has held that petitioners' failure to urge at their trial that the Birrell records had been illegally seized, constitutes a waiver of this point, citing its own decision in *United States* v. *Indiviglio*, 352 F. 2d 276 (2nd Cir., 1965), cert. den. 383 U. S. 907 (1966).

Nevertheless, this Court held many years ago in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392 (1920), that an order suppressing evidence as having been illegally seized requires that said evidence shall not be used at all, and that the protective umbrella of the Fourth Amendment is to be extended to persons not having a conventional possessory interest in said property. This principle was further extended by this Court in *McDonald* v. *United States*, 335 U. S. 451 (1948). The holdings in *Jones* v. *United States*, 362 U. S. 257 (1960), and *Wong Sun* v. *United States*, 371 U. S. 471 (1963), are not contrary.

The government has relied upon the fact that there was a severance of trial as between Mr. Birrell and these petitioners, and that accordingly the government's illegal conduct leading to the illegal seizure of the Birrell records cloaks said misconduct with an immunity veil which petitioners cannot penetrate. Other courts have held to the contrary, following this Court's lead in both *Silverthorne*

Lumber Co., supra, and *McDonald, supra.* See e.g., *Hair* v. *United States,* 289 F. 2d 894 (D. C. Cir., 1961); *Takahashi* v. *United States,* 143 F. 2d 118 (9th Cir., 1944); *United States* v. *Thomson,* 113 F. 2d 643 (7th Cir., 1940); *Nelson* v. *United States,* 208 F. 2d 504 (D. C. Cir., 1953); *Schoeneman* v. *United States,* 317 F. 2d 173 (D. C. Cir., 1963); *Rosencranz* v. *United States,* 334 U. S. 738 (1st Cir., 1964) and 356 F. 2d 310, 313 (1st Cir., 1966); *United States* v. *Mullen,* 329 F. 2d 295 (5th Cir., 1964).

The issues in this particular point involve a basic problem of the proper dimensions of the Fourth Amendment, and is a matter which commends itself to the further judicial scrutiny of this Court. Accordingly, certiorari should be granted on this point.

CONCLUSION

For all of the foregoing reasons, this petition for writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

DANIEL H. GREENBERG,
Counsel for Petitioners.

April 12, 1967.

Appendix A.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 208—September Term, 1966.

(Argued November 17, 1966 Decided February 6, 1967.)

Docket No. 30710

UNITED STATES OF AMERICA,

Appellee,

—v.—

GERARDO A. RE, also known as JERRY A. RE and GERARD F. RE,

Appellants.

Before:

WATERMAN, MOORE and HAYS,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Dudley B. Bonsal, *Judge,* denying appellants' motion under 28 U. S. C. § 1651 to set aside judgments of conviction and vacate sentences previously imposed.

Affirmed.

DAVID M. DORSEN (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Robert L. King, Assistant United States Attorney, on the brief), *for Appellee.*

DANIEL H. GREENBERG, New York, New York, *for Appellants.*

Appendix A

HAYS, *Circuit Judge*:

Gerardo A. Re and Gerard F. Re appeal from an order of the United States District Court for the Southern District of New York denying their motion under 28 U. S. C. § 1651, the all writs statute, for a writ in the nature of a writ of error *coram nobis*. Appellants were convicted of violating the Securities Act of 1933 and the Securities Exchange Act of 1934. This court affirmed their convictions, 336 F. 2d 306 (1964) and the Supreme Court denied certiorari, 379 U. S. 904 (1964). They now attack their convictions on the ground that at their trial they were denied certain constitutional rights. We find no merit in appellants' contentions and therefore affirm the order denying their motion.

Since appellants are on probation they are in custody and are entitled to seek a remedy under 28 U. S. C. § 2255.[1]

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[1] § 2255. *Federal custody; remedies on motion attacking sentence.*

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside, and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(*continued on following page*)

Appendix A

See *United States* v. *Washington,* 341 F. 2d 277, 280 (3d Cir.), cert. denied sub nom. *DeGregory* v. *United States,* 382 U. S. 850 (1965); cf. *United States ex rel. Brewer* v. *Maroney,* 315 F. 2d 687 (3d Cir. 1963); *Dillingham* v. *United States,* 76 F. 2d 35 (5th Cir. 1935). We treat their motion as having been made under that section.

I.

Appellants' first contention is that their constitutional rights were invaded when certain records were used as evidence against them. These records consisted of cash books maintained by one Birrell. Birrell was originally indicted along with appellants but his trial was severed because at the time of appellants' trial he was a fugitive from justice.

At their trial appellants objected to the admission of the cash books on the ground that they should be excluded as hearsay. On the appeal from their conviction this court held that the cash books were properly admitted as business records. 336 F. 2d at 312-314.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A writ of error coram nobis is available to one who has been released from custody. See *United States* v. *Morgan,* 346 U. S. 502 (1954); *United States* v. *Garguilo,* 324 F. 2d 795, 796 (2d Cir. 1963).

Two years after appellants' conviction a motion by Birrell to suppress these records as evidence against him was granted on the ground that the records had been unlawfully seized. *United States* v. *Birrell,* 242 F. Supp. 191 (S. D. N. Y. 1965); 243 F. Supp. 36 (S. D. N. Y. 1965).

Appellants contend that they are entitled to take advantage of the suppression of Birrell's records, i.e. that their conviction must be set aside because the records which were suppressed as to Birrell were used against them.

Since appellants did not move at their own trial to suppress this evidence although they were aware of the circumstances in which it was obtained, appellants cannot now raise the claim of illegal seizure. *United States* v. *Indiviglio,* 352 F. 2d 276 (2d Cir. 1965), cert. denied, 338 U. S. 907 (1966). Moreover,

> "[A] § 2255 proceeding does not serve the office of an appeal. Butler v. United States, 340 F. 2d 63 (8 Cir. 1965) [cert. denied, 382 U. S. 847 (1965)] and cases there cited; Glouser v. United States, 296 F. 2d 853, 856 (8 Cir. 1961) [cert. denied, 363 U. S. 825 (1962)]. And it is settled that the question whether evidence was seized illegally ordinarily may not be successfully raised in a proceeding which constitutes a collateral attack on the sentence, but must be presented in the appeal from the conviction." *Springer* v. *United States,* 340 F. 2d 950, 951 (8th Cir. 1965); *United States* v. *Jenkins,* 281 F. 2d 193 (3d Cir. 1960); *Kyle* v. *United States,* 266 F. 2d 670, 672 (2d Cir. 1959), cert. denied, 361 U. S. 870 (1959).

In any event appellants' claim lacks substantial merit. They had no personal or proprietary interest in these records and therefore no standing to secure their suppression. *Wong Sun* v. *United States,* 371 U. S. 471, 491-92 (1963); *United States* v. *Bozza,* 365 F. 2d 206, 222-23 (2d Cir. 1966);

United States v. *Granello*, 365 F. 2d 990, 996 (2d Cir. 1966), petition for cert. filed 35 U. S. L. Week 3175 (U. S. Nov. 15, 1966) (No. 750).

II.

Appellants' second contention is that they were wrongfully excluded from a hearing which took place in the trial judge's chambers and which was concerned with a possible conflict of interest of an attorney who had formerly represented them. This procedure, they claim, deprived them of their constitutional right to a public trial and to be confronted by the witnesses against them.

We need not decide whether appellants had a constitutional right to be present and to confront their former counsel at the hearing concerning his conflicting interests. Compare *Snyder* v. *Massachusetts*, 291 U. S. 97 (1934); *Stein* v. *United States*, 313 F. 2d 518, 522 (9th Cir. 1962), cert. denied, 373 U. S. 918 (1963); *Glouser* v. *United States*, 296 F. 2d 853 (8th Cir. 1961), cert. denied, 363 U. S. 825 (1962); *Cox* v. *United States*, 309 F. 2d 614, 615-16 (8th Cir. 1962) and *People ex rel. Lupo* v. *Fay*, 13 N. Y. 2d 253, 196 N. E. 2d 56, 246 N. Y. S. 2d 399 (1963), cert. denied, 376 U. S. 958 (1964) with *Pointer* v. *Texas*, 380 U. S. 400 (1965) and *People* v. *Anderson*, 16 N. Y. 2d 282, 213 N. E. 2d 659, 266 N. Y. S. 2d 110 (1965). Appellants waived any such right to be present by failing to object to their alleged exclusion either at the trial or upon direct appeal. See *Stein* v. *United States, supra*, 522 (9th Cir. 1962) (alternative holding); *Kyle* v. *United States, supra*, 266 F. 2d at 672; *United States* v. *Jenkins, supra*, 281 F. 2d at 193-94.

Moreover, "it is only when there has been the *denial of the substance of a fair trial* that the validity of the proceedings may be . . . collaterally attacked or questioned by motion in the nature of a petition for writ of error coram nobis or under 28 U. S. C. A. 2255." *Glouser* v. *United States, supra*, 296 F. 2d at 856, quoting *Howell* v. *United*

States, 172 F. 2d 213, 215 (4th Cir.), cert. denied, 337 U. S. 906 (1949).

Appellants' absence from the hearing was apparently entirely voluntary and they would have been admitted had they presented themselves. Their counsel attended the hearing and appellants had access to the entire transcript of the hearing before their first appeal and indeed reprinted it in their appendix on that appeal. The issue considered at the hearing was before this court on the previous appeal. We concluded that no impropriety or prejudice to appellants had been shown.[2] The question of appellants' absence from the hearing was not raised by counsel nor by appellants themselves at any time during the earlier proceedings.

Appellants' claim that hearing the conflict of interest matter in chambers constituted denial of a public trial is equally without merit. *Hayes* v. *United States,* 296 F. 2d 657, 668 (8th Cir. 1961), cert. denied, 369 U. S. 867 (1962).

In these circumstances, the "motion . . . files and records of the case conclusively show that [appellants are] entitled to no relief"[3] and the trial court correctly denied them a hearing. *Simmons* v. *United States,* 302 F. 2d 71, 80 (3d Cir. 1962); *Burley* v. *United States,* 295 F. 2d 317 (10th Cir. 1961).

III.

Appellants argue that the District Judge should have disqualified himself under 28 U. S. C. § 455,[4] since he would be a material witness at any evidentiary hearing held to determine the circumstances of their absence from the conflict of interest hearing. "[T]he literal terms of 28 U. S. C.

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[2] 336 F. 2d at 318-19.

[3] 28 U.S.C. § 2255. See *supra* note 1.

[4] § 455. *Interest of justice or judge.*

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness . . . .

§ 455 (1958) require disqualification only if the judge *is* a witness." *United States* v. *Hughes*, 325 F. 2d 789, 792-93 (2d Cir.), cert. denied, 377 U. S. 907 (1964). Here, the trial judge properly denied appellants a hearing and therefore the occasion for his testimony never arose. We need not decide the extent to which considerations of efficient judicial administration and particularly "the purpose of section 2255 . . . to permit the trial judge, because of his familiarity with the proceedings and ability to supplement the record," may limit the scope of Section 455. See *United States* v. *Smith*, 337 F. 2d 49, 51-54 (4th Cir. 1964), cert. denied, 381 U. S. 916 (1965).

The order denying appellants' motion is affirmed.

WATERMAN, *Circuit Judge* (concurring):

I concur in affirming the denial of appellants' motion, and concur in my brother Hays's opinion disposing of two of appellants' three claims: the claim that appellants' constitutional rights were invaded when Birrell's cash books were admitted into evidence at trial, and the claim that Judge Bonsal should have disqualified himself from acting upon their motion.

However, I do not find enough in any record to satisfy me that appellants, at the time when their trial counsel arranged for the *in camera* hearing relative to Mr. Z, would have been admitted to Judge Bonsal's chambers, or to satisfy me that they voluntarily excluded themselves from attendance knowing what testimony was there to be taken. Therefore, I do not agree that appellants at trial intentionally relinquished a constitutional right that they were aware of at that time.

I do agree that they are fully chargeable with awareness and knowledge of the contents of the printed appendix they

filed with us when they took their direct appeals, *United States* v. *Re*, 336 F. 2d 306 (2 Cir.), *cert. denied*, 379 U. S. 904 (1964), from their convictions, which appendix contained the complete transcript of the *in camera* hearing. The issue appellants now seek to raise collaterally was implicit in the claims made to us on the direct appeal, *United States* v. *Re*, *supra* at 318-319; and the trial court, in view of our previous disposition of the issue, properly denied this collateral motion. See *United States* v. *Marchese*, 341 F. 2d 782, 789 (9 Cir.), *cert. denied*, 382 U. S. 817 (1965); *Matysek* v. *United States*, 339 F. 2d 389, 391 (9 Cir. 1964), *cert. denied*, 381 U. S. 914 (1965); *Stein* v. *United States*, 313 F. 2d 518, 522 (9 Cir. 1962), *cert. denied*, 373 U. S. 918 (1963); *United States* v. *Jenkins*, 281 F. 2d 193 (3 Cir. 1960).

Appendix B.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

DANIEL H. GREENBERG,
New York, N. Y., for appellants.

Petition denied.

S.R.W.

L.P.M.

P.R.H.

U.S.C.JJ.

Mar 16 1967

Appendix C.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

PETITION FOR REHEARING IN BANC

DANIEL H. GREENBERG,
New York, N. Y., for appellants.

No active circuit judge having requested that a vote be taken on the suggestion that the case be reheard in banc, the same stands denied.

16 March 1967

J. EDWARD LUMBARD
Chief Judge

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1276

GERARDO A. RE a/k/a JERRY A. RE and GERARD F. RE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 372 F. 2d 641.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1967. A petition for rehearing was denied on March 16, 1967. The petition for a writ of certiorari was filed on April 15, 1967. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' motion under 28 U.S.C. 2255 was properly denied without a hearing.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted (with others) of conspiracy to violate the Securities Acts and of selling unregistered shares. On September 10, 1963, they were sentenced to six months' imprisonment, to be followed by a period of three years' probation; each was also fined $15,000. The court of appeals affirmed. 336 F. 2d 306 (C.A. 2), certiorari denied, 379 U.S. 904.

The evidence, which is not in issue here, is set forth in some detail in the opinion of the court of appeals, 336 F. 2d at 309-311. It showed that in 1954 one Birrell, a co-defendant who was separately tried, gained control of a company named Swan-Finch. Birrell granted petitioners an option to buy shares of Swan-Finch and shortly thereafter petitioners became market specialists in that security, which was traded on the American Stock Exchange. Through stock splits and corporate acquisitions the total amount of Swan-Finch stock was increased from 34,794 shares to 2,800,000 shares, none of which was ever registered with the SEC. Petitioners manipulated the market in Swan-Finch for Birrell by selling

and buying large quantities of Swan-Finch stock through accounts which they controlled in the names of various persons. They were compensated by Birrell for these services.

In 1966 petitioners moved in the district court under 28 U.S.C. 2255 to have their convictions set aside [1] on the ground that various of Birrell's records relating to Swan-Finch had been illegally seized and introduced at their trial. They also alleged that they had been excluded, in violation of their constitutional rights, from a hearing held in the judge's chambers during the trial to determine whether their former counsel, Mr. Milton Gould, who also represented one of the government's witnesses at the trial, had been guilty of any impropriety which might have prejudiced their defense. The district court denied the motion without a hearing and the court of appeals affirmed (Pet. App. A).

ARGUMENT

1. Petitioners' contention that records of Birrell relating to Swan-Finch should not have been introduced at their trial rests on the fact that, at a subsequent trial of Birrell alone, the district court held that as to him the seizure of those records had violated the Fourth Amendment. *United States* v. *Birrell*, 242 F. Supp. 191 (S.D.N.Y.); see also *United*

[1] Petitioners denominated their action as one under the All-Writs statute, 28 U.S.C. 1651, but the courts below properly treated it as a motion under 28 U.S.C. 2255, since petitioners, who are serving their sentence of probation, are still in federal custody. See *Jones* v. *Cunningham*, 371 U.S. 236.

States v. *Birrell*, 243 F. Supp. 36 (S.D.N.Y.). It is clear, however, that petitioners, who were not on the premises at the time of the seizure and who had no proprietary interest in the documents taken, are without standing to contest the seizure. *Wong Sun* v. *United States*, 371 U.S. 471, 491-492; *Jones* v. *United States*, 362 U.S. 257, 261. Moreover, as the court of appeals noted (Pet. App. 21), petitioners were aware at trial of the circumstances under which the records had been seized but made no motion to suppress the evidence. In these circumstances they may not raise the contention for the first time in a collateral proceeding under 28 U.S.C. 2255. See, *e.g.*, *Thornton* v. *United States*, 368 F. 2d 822 (C.A.D.C.); *United States* v. *Walker*, 197 F. 2d 287 (C.A. 2), certiorari denied, 344 U.S. 877.[2]

2. At petitioners' trial a hearing was held in the judge's chambers to determine whether petitioners' former lawyer, Mr. Gould, who also represented one Birnbaum, a government witness at the trial, had committed any misconduct, with respect to the disclosure of privileged information to Birnbaum, which might have prejudiced petitioners. The hearing was requested after the government introduced a photostat of a letter, obtained from Mr. Gould's firm, from

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[2] It is thus unnecessary to reach the question whether a Fourth Amendment search-and-seizure claim is cognizable at all on a Section 2255 motion. Compare *Kapsalis* v. *United States*, 345 F. 2d 392 (C.A. 7), certiorari denied, 382 U.S. 946, with *Gaitan* v. *United States*, 317 F. 2d 494, 496 (C.A. 10) (dictum). See generally, Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378 (1964).

one of the co-defendants to Birnbaum (Br. App. 53a).[3] Counsel for petitioners, but not petitioners themselves, was present at the hearing, at which Mr. Gould (referred to as "Z" in the transcript) testified (Br. App. 82a, 85a). The evidence he gave showed that Birnbaum's company was a long-time client of the law firm of which he was a partner and that he had represented the company in an action in 1956 to enjoin violations of the Securities Act with regard to Swan-Finch. In that litigation petitioners had been represented by other counsel (Br. App. 86a-87a, 102a). In 1961 petitioners retained Mr. Gould in connection with hearings before the SEC relating to the revocation of their broker-dealer license. Mr. Gould disclosed to petitioners at that time that he represented Birnbaum but said he saw no conflict (Br. App. 89a-92a, 100a). Subsequently Mr. Gould appeared with petitioners before a United States Commissioner and had a conference with the United States Attorney's Office relative to a criminal matter not pertinent here. He did not thereafter represent petitioners (Br. App. 92a-94a). Birnbaum was later summoned to give evidence before the grand jury which indicted petitioners. Mr. Gould arranged a time and place for Birnbaum to appear but did not discuss his testimony with him or with any government attorney (Br. App. 95a-96a). He never disclosed to Birnbaum or to any government official any

[3] "Br. App." refers to petitioners' appendix to their brief in the court of appeals in 1964, which contains excerpts from the testimony at the hearing. We are lodging a copy of that appendix with the Clerk of this Court.

confidential information he had received from petitioners (Br. App. 103a). The document from his firm's files which was used at trial was given to the government by another member of the firm (Br. App. 97a-98a).

On direct appeal of their convictions, petitioners asserted that Mr. Gould's alleged conflict of interest in representing both themselves and Birnbaum had impaired their defense. After finding the facts as recited above, the court of appeals rejected the contention, holding that the "conduct of [the attorney] was not improper and that appellants have failed to show that his professional relationship with Birnbaum prejudiced their defense in any manner." *United States* v. *Re*, 336 F. 2d 306, 319 (C.A. 2). Petitioners now argue that their own trial counsel kept them from attending the hearing (Pet. 13), and that their "exclusion" from the hearing violated their rights of confrontation. Petitioners, however, can hardly tax the prosecution with the fact that their own lawyers considered their presence unnecessary or undesirable (*ibid.*) at that hearing on a matter tangential to the criminal case. We point out additionally that the issue of Mr. Gould's alleged conflict of interest was fully argued on direct appeal. The transcript of the *in camera* hearing, which had been ordered sealed by the district judge at trial, had been unsealed for the purposes of the original appeal and was reprinted in petitioners' appendix to their brief in the court of appeals. As Judge Waterman stated in his concurring opinion below, the issue now sought to be raised collaterally "was implicit in the claims made * * *

on the direct appeal" (Pet. App. 25) and hence is not available on collateral attack. See *Stein* v. *United States*, 313 F. 2d 518, 522 (C.A. 9), certiorari denied, 373 U.S. 918; *Glouser* v. *United States*, 296 F. 2d 853 (C.A. 8), certiorari denied, 369 U.S. 825; *Taylor* v. *United States*, 177 F. 2d 194, 195 (C.A. 4).

Since all of petitioners' contentions could be conclusively determined on the "files and records of the case," the district court properly denied the motion without a hearing. 28 U.S.C. 2255.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

MAY 1967.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1276

GERARDO A. RE, also known as JERRY A. RÉ and GERARD F. RE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR REMAND, AFFIDAVIT AND EXHIBITS IN SUPPORT THEREOF

DANIEL H. GREENBERG,
Attorney for Petitioners,
475 Fifth Avenue,
New York, New York 10017.
212—LExington 2—6600

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Notice of Motion.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1276

GERARDO A. RE, also known as JERRY A. RE and GERARD F. RE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petitioners Gerardo A. Re, also known as Jerry A. Re, and Gerard F. Re, respectfully move this Court to remand this proceeding to the United States District Court for the Southern District of New York, for the purpose of holding and conducting a plenary hearing on the allegations set forth in the annexed affidavit of Daniel H. Greenberg, and to grant unto petitioners such other and further relief as to the Court may seem just and proper.

Dated: New York, New York, May 23, 1967.

DANIEL H. GREENBERG,
Attorney for Petitioners.

Affidavit

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1276

GERARDO A. RE, also known as JERRY A. RE and GERARD F. RE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DANIEL H. GREENBERG, being duly sworn, deposes and says:

1. The petition for a writ of certiorari was filed in this proceeding on April 15, 1967, and the brief in opposition by the United States of America was filed on May 17, 1967. Each of these documents is respectfully incorporated by reference herein.

2. I am the attorney for petitioners herein and I respectfully submit this affidavit in support of the motion of petitioners to remand this proceeding to the United States District Court for the Southern District of New York, for the purpose of holding and conducting a plenary hearing

on the allegations set forth in this affidavit, as well as those set forth in the original petition filed in the district court below for a writ in the nature of a writ of error *coram nobis* (treated in the courts below as a petition under Title 28, United States Code, § 2255), the supplemental petition, statement of particulars and reply affidavit, all submitted in connection herewith. The source of my information and the grounds for my belief in making this affidavit and the aforesaid motion are matters which have come to my knowledge and attention subsequent to the proceedings in this case held in the United States Court of Appeals for the Second Circuit and to my preparation and filing of the petition for a writ of certiorari herein. The authority for the procedure invoked by this motion and for the relief requested herein is the decision of this Court in *United States* v. *Shotwell Manufacturing Co.*, 355 U. S. 233 (1957).

3. One of the grounds upon which petitioners seek review by certiorari in their petition before this Court is the propriety of the use made by the government in this criminal prosecution of evidence, consisting of files, records, books, papers and other documents, which were illegally seized from their co-defendant in the same indictment, Lowell M. Birrell. The search and seizure of said records has been held by the same district court to have been in violation of the Fourth Amendment to the Constitution. This adjudication was made at a time subsequent to petitioner's trial, but during the course of the pre-trial proceedings as to Mr. Birrell. The facts are that following Mr. Birrell's departure from the United States, a large quantity of books, records, files and other documents were seized from premises in Bucks County, Pennsylvania. Said seizure took place several years before the filing of the indictment in this case. The basis for the seizure of the so-called "Birrell records" was two search warrants issued

out of the United States District Court for the Eastern District of Pennsylvania on August 22, 1959 and August 24, 1959 upon the affidavit basically of Edward C. Kalaidjian, Esq., attorney for the Trustee in Bankruptcy of Equitable Plan Company of Los Angeles, California. It has been the contention of the government throughout the pre-trial and post-trial proceedings of these petitioners, even as late as the brief submitted in opposition to the present petition for writ of certiorari, that petitioners lack and have lacked "standing" to complain about the search and seizure of the "Birrell records" and the use of such records as evidence against them at their trial, because they had no proprietary interest in said records and they were not among the objects or targets of said search. The Court of Appeals has accepted this assertion in its opinion affirming the order denying the petition herein. See 372 F. 2d 641, 644.

4. The fact is that petitioners did not learn until very recently, when they obtained copies of the aforesaid two search warrants, that they did have "standing", as that term is defined by this Court's decision in *Jones* v. *United States,* 362 U. S. 257, 261 (1960), to complain against said search and seizure, by reason of the fact that they were among the persons listed in said search warrants as being objects or targets of the search. This fact has been known to the government throughout these proceedings, but has been concealed from petitioners, in apparent violation of decisions of this Court in many cases, including, among others, *Brady* v. *Maryland,* 373 U. S. 83 (1963) and *Miller* v. *Pate,* No. 250 Oct. Term, 1966 (decided February 13, 1967). The government had a clear duty to disclose to petitioners or their attorneys their status as objects or targets of the two search warrants to enable them to test their validity as to them. This the government failed to do; rather it affirmatively concealed petitioners' status and standing in this matter.

5. This case does not involve a situation of petitioners knowingly waiving a known right. Throughout this case the government has contended and argued with great force that petitioners had no "standing" to object to the Birrell search and seizure because they were not among the objects or targets of that search. Yet the truth of the matter is directly contrary to this oft-repeated assertion. Thus, petitioners' failure to move pretrial to suppress the "Birrell records" as evidence which had been illegally seized from Mr. Birrell is not tantamount to a waiver by them of their rights herein. Moreover, the search warrants were also concealed from their trial attorney which warrants named petitioners as persons "against whom the search was directed," *Jones* v. *United States,* 362 U. S. 257, 261 (1960), as was the inventory, *infra,* designating their property in the items seized. Nevertheless, the affirmative acts of concealment by the government of petitioners' "standing" in this situation amounts in effect to a knowing suppression by the government of facts within its possession which would render this illegally seized evidence in its hands, subject to petitioners' right to move for its suppression. Since the commencement of this case there has been a duty on the government to make a proper and adequate disclosure to the defendants or their attorneys of the foregoing facts. For these reasons and at this point in the case, a plenary hearing on the entire background of the matter should be ordered by this Court in order to develop a record of this entire affair in this case. Parenthetically, it is to be noted also that by letter dated February 25, 1963, written by William V. Crosswhite, Esq., Regional Counsel of the Internal Revenue Service, New York City, to Honorable Louis F. Oberdorfer, then Assistant Attorney General, Tax Division, stated that the Criminal and Tax Divisions of the Department of Justice had found the seizure of the Birrell files to be illegal. Nevertheless, the government proceeded to use these records as evidence under the circumstances detailed hereinabove.

6. Petitioners also have learned recently that a 300 page summary or inventory of the contents of the books, records and files seized from Mr. Birrell has been prepared by the government and that a copy of this inventory has been furnished to Mr. Birell and his counsel. Petitioners sought to obtain a copy of said inventory from the government through the United States District Court for the Southern District of New York, but thus far they have been forestalled and thwarted from obtaining such copy. I have reason to believe based upon my constantly growing knowledge of the facts of this case, that this inventory contains details of records belonging to petitioners which were among those seized with the Birrell files. This is made more evident by the letter of Mr. Kalaidjian, dated May 22, 1961, addressed to Honorable Herbert Loewenthal, Referee, in Bankruptcy in the Southern District of New York, a copy of which is annexed hereto as an exhibit that among the records seized were those of Re, Re and Sagarese, the firm of these petitioners (See paragraph 5, p. 32, *infra*).

7. On April 26, 1967, I wrote to Honorable William B. Herlands, United States District Judge, of the Southern District of New York, requesting that a copy of the aforesaid inventory be furnished to me for use in this proceeding, stating that I desired this inventory to submit it to this Court. Copies of this letter were sent both to the United States Attorney and to the Solicitor General of the United States. On April 28, 1967, a hearing on this application was held before Judge Herlands, at which both a government attorney and I appeared. Judge Herlands stated that he was then about to decide Mr. Birrell's motion addressed to this inventory, and he conceded that the copy of the inventory previously furnished to Mr. Birrell and his counsel was under strictures precluding them from furnishing it to anyone else. Although, as Judge Herlands stated, this inventory was to be filed as part of the clerk's files in

the court records in the Birrell cases (including the untried indictment in this case as to Mr. Birrell), nevertheless it has not as yet been filed with the clerk. Since my appearance before him, Judge Herlands has not rendered his decision, although he stated in open court and on the record that "my decision and opinion are being typed."

8. Thereafter on May 10, 1967, I wrote to the United States Attorney, with a copy to the Solicitor General, directly requesting them that I be furnished with a copy of said inventory. To date I have not received any response to my letter. Thus, it would appear that again the government is attempting to conceal essential facts from petitioners, including the details of the Birrell files set forth in the 300 page inventory. Petitioners believe that among these many files are records belonging to them which were in Mr. Birrell's possession as a result of the attorney-client relationship which had existed between them.

9. Under all the circumstances, it would appear that a plenary hearing on these matters is warranted, to be held in the district court, to make a factual record of the facts and circumstances of petitioners' status, standing and interest in the Birrell files as well as the nature and extent of their own records and files which were among those seized in the Birrell files. Petitioners believe that such hearing should be held before a district judge having no prior connection with this case. From such hearing the entire background of this matter can be ascertained in order to determine if petitioners were convicted on evidence obtained, and by the use of practices and conduct of the government, in violation of their constitutional rights and in express violation of the Fourth and Fifth Amendments to the Constitution. Simultaneously, the relief requested in the petition pending before this Court, for a

hearing as to the factual circumstances of the *in camera* hearing held before the trial judge, should also be ordered. Such hearing will disclose for the first time in realistic fashion the full nature and extent of the unfairness of the procedures employed in this case and the deprivation of petitioners' constitutional rights in the district court below.

10. Annexed hereto as exhibits, are copies of the search warrants, the affidavits upon which the warrants were based, and returns thereon, all referred to in this affidavit. These warrants are dated respectively August 22, 1959 and August 24, 1959. There is also enclosed as an exhibit the Kalaidjian letter to Referee Loewenthal, referred to hereinabove.

WHEREFORE, it is respectfully prayed that this motion be granted in all respects, and that this proceeding be remanded to the United States District Court for the Southern District of New York, for the purpose of holding and conducting a plenary hearing on the allegations set forth herein, and granting unto petitioners such other and further relief as to the Court may seem just and proper.

DANIEL H. GREENBERG

Sworn to before me this
23rd day of May, 1967.

GAIL ORRICK,
Notary Public,
State of New York.
Qualified in Bronx County.
No. 03-8233713.
Commission Expires March 30, 1968.

Search Warrant.

UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF PENNSYLVANIA

Commissioner's Docket No. 2

Case No. 142

UNITED STATES OF AMERICA

v.

JONATHAN DUNN
Sugar Bottom Road
Furlong, Pa.

To William A. O'Brien, United States Marshal, and H. Lawrence Clark, Deputy United States Marshal.

Affidavit having been made before me by Edward C. Kalaidjian that he (has reason to believe) that (on the premises known as) the dwelling, barn and garage of Jonathan Dunn, located on Sugar Bottom Road, Furlong, Pa. in the Eastern District of Pennsylvania there is now being concealed certain property, namely correspondence, memoranda, Minute Books, Journals, Cash Books, Cancelled checks, Books of Original Entry and other records contained in approximately twenty-four (24) filing cabinets, concerning companies, corporations, businesses, firms and individuals set forth on the attached list made a part of this Search Warrant and Affidavit, for the period from January 1, 1953, to the present date, which have been used in committing a violation of Title 18, United States

Code, Section 1341, by the use of the mails by one Lowell M. Birrell in a scheme to defraud Certificate Holders and other creditors of Equitable Plan Company, 6225 South Vermont Avenue, Los Angeles, California and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the (premises) above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the (place) named for the property specified, serving this warrant and making the search (in the daytime) and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 22nd day of August, 1959.

EDWARD W. FURIA,
U. S. Commissioner.

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[1] The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

Affidavit for Search Warrant.

UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF PENNSYLVANIA

Commissioner's Docket No. 2

Case No. 142

UNITED STATES OF AMERICA

v.

JONATHAN DUNN
Sugar Bottom Road
Furlong, Pa.

Before Edward W. Furia, Philadelphia, Pennsylvania.

The undersigned being duly sworn deposes and says:

That he (has reason to believe) that (on the premises known as) the dwelling barn and garage of Jonathan Dunn, located on Sugar Bottom Road, Furlong, Pa., in the Eastern District of Pennsylvania, there is now being concealed certain property, namely correspondence, memoranda, Minute Books, Journals, Cash Books, Cancelled checks, Books of Original Entry and other records contained in approximately twenty-four (24) filing cabinets, concerning companies, corporations, businesses, firms and individuals set forth on the attached list made a part of this Affidavit and the Search Warrant, for the period from January 1, 1953, to the present date, which have been used in committing a violation of Title 18, United States Code, Section 1341, by the use of the mails in a scheme to defraud Certificate Holders and other creditors of Equitable Plan Company, 6226 South Vermont Avenue, Los Angeles, California.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

Affidavit for Search Warrant.

At an examination of Mr. Joseph A. DeRisi, who said he was Lowell M. Birrell's personal accountant and an officer of some of the corporations on the attached list, on Thursday, August 20, 1959, Mr. DeRisi stated under oath that the records of Lowell M. Birrell and of companies which he dominated or with which he was associated were in storage at the garage and barn on the premises of Jonathan Dunn, Suger Bottom Road, Furlong, Pa., and that Jonathan Dunn also has an office in his dwelling at the said address where deponent believes additional records may be located, and deponent believes that said records should pertain to all or some of the persons, firms and corporations identified in the attached list, and that said records should contain material evidence with respect to the looting of Equitable Plan Company during the period commencing in October, 1953, when that company came under the domination of Birrell and the persons and firms associated with him. Mr. DeRisi also stated that Jonathan Dunn has been an attorney for Lowell M. Birrell. Deponent's examination of Mr. DeRisi, upon which the foregoing affidavit is based, was conducted in an Ancillary Proceeding in the United States District Court for the Southern District of New York in connection with a proceeding for the reorganization of Equitable Plan Company pending in the United States District Court for the Southern District of California, Central Division.

E. C. KALAIDJIAN,
Signature of Affiant.

Sworn to before me, and subscribed in my presence, Aug. 22, 1957.

EDWARD W. FURIA,
United States Commissioner.

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[1] The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

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ANTILLIAN INVESTMENTS, INC.
ATLANTIC BROKERAGE AGENCY, INC.
AMERICAN DYEWOOD COMPANY
AMERICAN DRUGGISTS SYNDICATE, INC.
ADSYN, INC.
JOSEPH D. BLAU
SEYMOUR BERDON
MATTHEW BERDON
LOWELL M. BIRRELL
ELIOT BERKWIT
ALEXANDER BLUMENTHAL
LUIS J. BOTIFOLL
NAHUM BIRNBAUM
BIRNBAUM & COMPANY
BIRRELL & LARSON
BARTELS BREWING COMPANY OF DELAWARE
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CAMDEN FORGE COMPANY
CUBONDA PETROLEUM, INC.
ORLANDO CASTILLO
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CONTINENTAL CAR-NA-VAR CORP.
CHARLES HOLDINGS, INC.
C. J. SIMPSON GRAIN COMPANY
C. J. SIMPSON GRILLING CORP.
JOSE CAPMANY
JOSEPH DeRISI
DOMESTIC & OVERSEAS CORP.
DOESKIN PRODUCTS, INC.
VIRGIL D. DARDI
LEON DREZNER
D. & D. DRILLING CORPORATION
RAUL deJUAN
PATRICK F. DAWSON
DRUG PRODUCTS, INC.
EKCO CORPORATION
ECHO FALLS OIL COMPANY
ECHO FALLS FARMS CO.
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J. W. EHRLICH
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JAY FISHER
MATTHEW FOX
FERRO BERDON & CO.
FISCAL BUREAU, INC.
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EDWARD G. FRAWLEY
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LOWELL M. BIRRELL & COMPANY, LIMITED
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RUBY SCHINASI
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SAFEWAY FACTORS, INC.
S & C TRADING CO., INC.
1790 CORPORATION
THE CHASE MANHATTAN BANK and any of its officers or employees
MANUFACTURERS TRUST COMPANY and any of its officers or employees
BANK OF AMERICA and any of its officers or employees

JOSEPH L. SELTZER
WALTER P. SMITH
VERNA SKOGLUND
HARRY T. SLAVIN
SAVARD & HART
SEYMAT ASSOCIATES
PAUL SARNOFF
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UNITED DYE & CHEMICAL CORPORATION
CURTIS C. WHITNEY
PATRICK WOISTED
WILLIAM PENN FIRE INSURANCE COMPANY
HARRY WORKMAN
LUBIT, SINGERMAN & CAPUSTIN

and any other company, corporation, business, firm or individual with whom Lowell M. Birrell has been associated.

Return.

I received the attached search warrant August 22, 1959, and have executed it as follows:

On August 22, 1959, at 1:00 o'clock P.M. I searched (the person) (the preimses) described in the warrant and

I left a copy of the warrant with Jonathon Dunn together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

> Known as Lot #1. Consisting of twenty-one (21) metal and/or wooden file cabinets containing four (4) Drawers. Each drawer containing files, records, information relevant to appended sheet on search warrant and numbered consecutively, from one (1) to eighty-four (84), and thirteen independent cabinets containing files, records and information relevant to appended sheet of search warrant and numbered consecutively from eighty-five (85) to ninety-seven (97) inclusive. Also six (6) cardboard cartons containing files, records and information relative to appended sheet of search warrant and numbered consecutively carton number one (1) to carton number six (6) enclusive. Also One (1) strongbox locked.

This inventory was made in the presence of Edward Kalajjian the Affidavit on the Search Warrant and Jonathon Dunn, the Lessor of the premises searched.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

H. Lawrence Clark.

Subscribed and sworn to and returned before me this 25 day of August, 1959.

Edward W. Furia,
United States Commissioner.

Return.

Furlong
Bucks Co., Pa.
Aug. 22, 1959

Seized of Jonathan D. Dunn the following:

1—Lomega Exploration Ltd. License to do business
1—Photograph Album
21—Cabinets
11—Drawers
2—Cabinet Drawers
1—Cardboard Box
2—Cartons
3—Packages

42—Items and Contents Thereof

H. LAWRENCE CLARK
Deputy U. S. Marshal
E. D. of Pa.

Search Warrant.

UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF PENNSYLVANIA

Commissioner's Docket No. 2

Case No. 144

UNITED STATES OF AMERICA

v.

LOWELL M. BIRRELL
Schulberg Farms
Old York Road near Ingham
Spring Road, New Hope, Pa.

To WILLIAM A. O'BRIEN, United States Marshal and H. LAWRENCE CLARK, Deputy United States Marshal.

Affidavit having been made before me by THOMAS J. HILLEGASS, Postal Inspector that he (has reason to believe) that (on the premises known as) Schulberg Farms, Old York Road near Ingham Spring Road, New Hope, Pa., in a two-story white frame barn, a part of which has been converted into living quarters, in the Eastern District of Pennsylvania there is now being concealed certain property, namely correspondence, memoranda, Minute Books, Journals, Cash Books, Cancelled checks, Books of Original Entry and other records contained in approximately twenty (20) filing cabinets, concerning companies, corporations,

businesses, firms and individuals set forth on the attached list made a part of this Search Warrant and Affidavit, for the period from January 1, 1953, to the present date, which have been used in committing a violation of Title 18, United States Code, Section 1341, by the use of the mails in a scheme to defraud Certificate Holders and other creditors of Equitable Plan Company, 6226 South Vermont Avenue, Los Angeles, California, and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the (premises) above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the (place) named for the property specified, serving the warrant and making the search (in the daytime) and if the property be found there to take it,[1] leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 24th day of August, 1959.

EDWARD W. FURIA,
U. S. Commissioner.

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[1] The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits be searched, the warrant may direct that it be served at any time." (Rule 41C)

Affidavit for Search Warrant.

UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF PENNSYLVANIA

Commissioner's Docket No. 2

Case No. 144

UNITED STATES OF AMERICA

v.

LOWELL M. BIRRELL
Schulberg Farms
Old York Road near Ingham
Spring Road, New Hope, Pa.

Before EDWARD W. FURIA, Philadelphia, Pa.

The undersigned being duly sworn deposes and says:

That he (has reason to believe) that (on the premises known as) Schulberg Farms, Old York Road near Ingham Spring Road, New Hope, Pa., in a two-story white frame barn, a part of which has been converted into living quarters in the Eastern District of Pennsylvania, there is now being concealed certain property, namely correspondence, memoranda, Minute Books, Journals, Cash Books, Cancelled checks, Book of Original Entry and other records contained in approximately twenty (20) filing cabinets, concerning companies, corporations, businesses, firms and individuals set forth on the attached list made a part of this Affidavit and the Search Warrants, for the period from January 1, 1953, to the present date, which have

been used in committing a violation of Title 28, United States Code, Section 1341, by the use of the mails in a scheme to defraud Certificate Holders and other creditors of Equitable Plan Company, 6226 South Vermont Avenue, Los Angeles, California.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: On Saturday, August 22, 1959, Mr. Jonathan Dunn, an attorney for Lowell M. Birrell, who resides on Sugar Bottom Road, Furlong, Pa., stated to the deponent that records of Lowell M. Birrell and of companies which he dominated or with which he was associated, were in storage in a two-story white frame barn on the Schulberg Farms, and deponent believes that said records should pertain to all or some of the persons, firms and corporation identified in the attached list, and that said records should contain material evidence with respect to the looting of Equitable Plan Company during the period commencing in October, 1953, when that company came under the domination of Birrell and the persons and firms associated with him.

THOMAS J. HILLEGASS,
Postal Inspector.

Sworn to before me, and subscribed in my presence, August 24, 1959.

EDWARD W. FURIA,
United States Commissioner.

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ADSYN, INC.
JOSEPH D. BLAU
SEYMOUR BERDON
MATTHEW BERDON
LOWELL M. BIRRELL
ELIOT BERKWIT
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CAMDEN FORGE COMPANY
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EKCO CORPORATION
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BUCKS COUNTY FARMS COMPANY
BURMONT CORPORATION
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JAY FISHER
MATTHEW FOX
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RELDAN TRADING CORPORATION
LOUIS RIVAS-VASQUEZ
RUBY SCHINASI
SAFEWAY & COMPANY, INC.
SAFEWAY FACTORS, INC.
S & C TRADING CO., INC.
1790 CORPORATION
THE CHASE MANHATTAN BANK and any of its officers or employees
MANUFACTURERS TRUST COMPANY and any of its officers or employees
BANK OF AMERICA and any of its officers or employees

Affidavit of Search Warrant.

JOSEPH L. SELTZER
WALTER P. SMITH
VERNA SKOGLUND
HARRY T. SLAVIN
SAVARD & HART
SEYMAT ASSOCIATES
PAUL SARNOFF
GEORGE STEWART
ROBERT F. SIX
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UNITED DYE & CHEMICAL CORPORATION
CURTIS C. WHITNEY
PATRICK WOISTED
WILLIAM PENN FIRE INSURANCE COMPANY
HARRY WORKMAN
LUBIT, SINGERMAN & CAPUSTIN

and any other company, corporation, business, firm or individual with whom Lowell M. Birrell has been associated.

Return.

I received the attached search warrant August 24, 1959 and have executed it as follows:

On August 24, 1959 at 1:30 o'clock P. M., I searched (the premises) described in the warrant and

I left a copy of the warrant with at the place of search. together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

> Known as Lot #2. Consisting of 21 metal and/or wooden file cabinets, containing four drawers each, one (1) metal file cabinet containing five (5) drawers, one (1) wooden bureau continuing four (4) drawers, each drawer containing files, records and information relevant to the appended sheets attached to this search warrant and numbered consecutively from one (1) to ninety-three (93) incl.

This inventory was made in the presence of James Phelan, Assistant U. S. Attorney and Thomas Hillegass, Postal Inspector

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

H. Lawrence Clark.

Subscribed and sworn to and returned before me this 25 day of August, 1959.

Edward W. Furia,
United States Commissioner.

Letter, dated May 22, 1961.

THACHER, PROFFITT, PRIZER, CRAWLEY & WOOD
(Barry, Wainwright, Thacher & Symmers)
40 Wall Street
New York 5, N. Y.

May 22, 1961

Honorable Herbert Loewenthal
Referee in Bankruptcy
United States Court House
Foley Square
New York, New York

Re: In the Matter of the Ancillary
Proceeding of Equitable Plan, Debtor
No. 93698
Our File No. 12,515

Dear Sir:

As attorneys for the debtor herein, we are submitting a brief summary concerning the conduct of the abovementioned ancillary proceeding which has been pending since December, 1958.

Equitable Plan Company, an industrial loan company at Los Angeles, California, is a debtor in a Chapter X reorganization proceeding pending in the United States District Court for the Southern District of California, Central Division. Its business, properly, was to accept the deposits from the general public and to invest the funds obtained in consumer finance paper, personal loans and choses in action. Commencing in October, 1953, the company was required by a corporate nominee of Lowell M. Birrell and a group of associates, and during the ensuing several years they proceeded to appropriate unlawfully from Equitable Plan Company funds of its depositors amounting to more than $8,000,000. The focal point of the conspiracy

appeared to be located in New York City and we were retained by the Trustee to commence an investigation and to institute various legal proceedings in behalf of the estate.

Our investigation has been conducted through the ancillary proceeding pursuant to § 167 of the Bankruptcy Act during the past two years. We have interrogated more than 40 witnesses at approximately 115 hearings and more than 10,000 pages of testimony have been taken. In addition, scores of business firms and individuals have produced thousands of documents and business records pursuant to subpoenas issued in that proceeding. The information and evidence thus obtained has been used in many legal proceedings:

1. A grand jury for Los Angeles County has handed up an indictment of Lowell Birrell and several former officers and directors of Equitable Plan Company based upon their looting of the company.

2. A federal grand jury in the Southern District of New York has handed up an indictment of several former officers and directors of Doeskin Products, Inc., based upon their participation in the theft of 1,070,000 of the corporation's common shares and their looting of that corporation (*United States of America* v. *Lowell M. Birrell,* et al. 60 Criminal 200). A number of the indicted defendants have already pleaded guilty to certain of the counts in the indictment.

3. Upon the application of the trustee of Equitable Plan Company, receiverships have been granted for Bucks County Farms, Inc., owner of approximately 800 acres of valuable real estate in Bucks County, Pa. (3 Cir., 280 F. 2d 739), Doeskin Products, Inc. (*Ferguson* v. *Tabah,* 2 Cir.,

F. 2d , decided April 13, 1961, affirming *Ferguson* v. *Birrell*, 190 F. Supp. 506) and The Bartels Brewing Company (Pa.)

4. An action has been brought against W. Lodi B. Realty Co. Inc. in the New Jersey State Court wherein the trustee has obtained an attachment of valuable industrial real estate through the exposure of Birrell's concealed beneficial interest therein.

5. In behalf of the trustee, we located and seized approximately 45 file cabinets at Bucks County, Pennsylvania, in August, 1959, containing records pertinent to the larcenies and manipulations of Lowell M. Birrell and the corporations which he dominated. Among the files seized were records pertinent to the activities of the brokerage firm of Re, Re and Sagarese. Copies of these records have been furnished to the Securities and Exchange Commission which recently announced its decision to conduct an investigation of the American Stock Exchange. The ancillary proceeding is still being vigorously prosecuted in a number of areas which have not yet been investigated and we cannot anticipate at this time when the proceeding will be concluded.

Respectfully,

THATCHER, PROFFITT, PRIZER, CRAWLEY & WOOD